UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| JULIUS HOBSON, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action No. 76-1326 |
| | ) | |
| JERRY WILSON, et al., | ) | |
| | ) | |
| Defendants. | ) | |

PLAINTIFFS' TRIAL MEMORANDUM
ON TORT OF INVASION OF PRIVACY

Memo

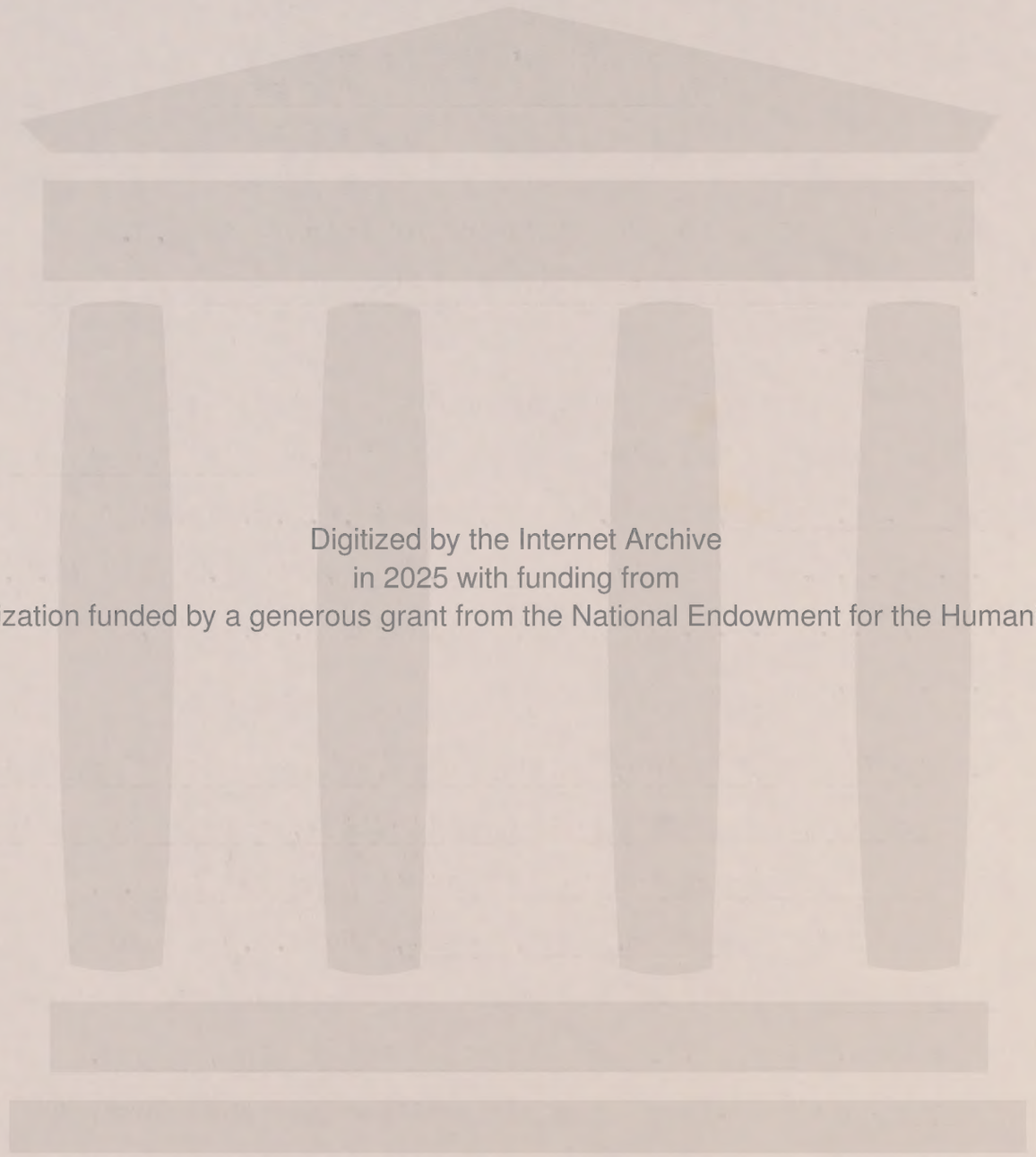
Re: Cause of Action for Invasion of Privacy in D.C.

1. The Common Law Action for Invasion of Privacy is Recognized In D.C.

"A common law cause of action for invasion of privacy is maintainable in the District of Columbia." Afro American Publishing Co. v. Jaffe, 366 F.2d 649, 653 (C.A.D.C. 1966) (en banc), 125 U.S.App.D.C. 70 (1966); Pearson v. Dodd, 410 F.2d 703 (D.A.D.C. 1969), U.S.App.D.C. 279, cert denied 89 S.Ct. 2021, 395 US 947, 23 L.Ed. 465.

2. "Intrusion," Which, Unlike Other Branches of The Invasion of Privacy, Does Not Require Publication, Only An Instusive Act, Has Furthermore Received Explicit Approval in D.C.

Until Pearson v. Dodd, supra, the D.C. Courts had considered publication of private information a necessary element of the cause of action. See, e.g. Afro-American Publishing, supra. However, in Pearson, Judge J. Skelly Wright writing for the Court, the Court faced the question of whether a tortious cause of action would be where the issue was manner in which information was obtained, not publication. The Court noted that this was the branch of privacy theory labelled by Prosser and a number of state courts as "intrusion." Unlike other types of invasion of privacy, intrusion does not involve as one of its essential elements publication. The tort



is completed with the obtaining of the information by improperly intrusive means. 410 F.2d at 704.

The Court went on to

> approve the extension of the tort of invasion of privacy to instances of intrusion, whether by physical trespass or not, into spheres in which an ordinary man could reasonably expect that the particular defendant should be excluded. Just as the Fourth Amendment has expanded to protect citizens where intrusion is not reasonably expected, so should tort law protect citizens from other citizens. 410 F.2d at 704.

Thus, a common law cause of action for invasion of privacy by other citizens would be coextensive with constitutional protection against the government.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing Plaintiffs' Trial Memorandum on Tort of Invasion of Privacy was hand delivered to David White, Department of Justice, Washington, D.C. 20530 and Laura Bonn, Assistant Corporation Counsel, District Building, 14th & E Streets, N.W., Washington, D.C. 20004 on this _____ day of _____, 1981.

_____
Daniel M. Schember

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., )
)
Plaintiffs, )
)
v. ) Civil Action No. 76-1326
)
JERRY WILSON, et al., )
)
Defendants. )

FILED

AUG 24 1981

JAMES E. DAVEY, Clerk

PRETRIAL ORDER

This matter having come before the Court on plaintiffs' motion for modified pretrial order, and it appearing this motion should be granted, it is this 14th day of August, 1981

ORDERED as follows:

1. The parties shall comply with the following schedule of pretrial proceedings. All motions for continuances or extensions of time of dates set forth in this pretrial order shall be accompanied either by a proposed modified schedule of all other dates in this pretrial order affected by the requested continuance or extension of time, and indicating all other parties' agreement or opposition to the motion and the proposed schedule, or by a representation that the requested continuance or extension of time will not affect any other date in this pretrial order.

2. Except for specific requests approved by the Court upon a party's motion, no further discovery from the FBI defendants or plaintiffs shall be allowed and all discovery requests to, and responses from, the District of Columbia defendants shall be completed on or before August 14, 1981. During discovery the Court is available on motion of either party with short notice to assist the parties in resolving disputes regarding discovery. Motions under Rule 37 shall be accompanied by a report indicating the efforts that counsel have made to resolve the discovery problems without the need for Court intervention.

3. Cut-off of discovery shall apply to all methods of discovery listed in Fed. R. Civ. P. 26(a). The cut-off shall, unless otherwise ordered for good cause shown, preclude any action

by a party or counsel, such as the noticing of a new or an additional expert witness, which would require the opposing party to seek further discovery.

4. Motions to dismiss or for summary judgment, if any, shall be filed on or before September 16, 1981; Responses to such motions shall be filed on or before October 2, 1981. In the event that any such motions are filed, a hearing on them will be held _____, 1981, in Courtroom No. 3, U. S. Courthouse, Washington, D.C., at 2:00 P.M.

5. Plaintiff shall file with the Clerk and serve a pretrial brief on or before October 20, 1981, and defendant shall file and serve a pretrial brief in response on or before October 30, 1981. The pretrial brief of each party shall include as separately titled and numbered sections:

(a) A list of the witnesses that the party intends to call, a brief summary of the testimony expected from each, and the estimated time required for that testimony.

(b) A statement of all facts proposed to be proven, set forth in simple, declarative sentences, separately numbered. With each statement of fact there shall be set forth in parentheses the names of witnesses, and the idenfified portions of depositions, pleadings, exhibits, or other documents to be introduced in proof of such fact.

(c) A statement of the legal contentions necessary to establish the party's claim or defense. Such contentions shall be individually, clearly, and concisely stated in separately numbered paragraphs. With each paragraph there shall be set forth in parentheses citation to legal authorities supporting the legal contention asserted, with an asterisk preceding each authority principally relied upon. The relevant text of any statute or regulation principally relied upon shall be set out in an appendix.

(d) A narrative argument of the law and facts supported by authorities.

(e) If either party has demanded trial by jury, each shall attach as appendices to the pretrial brief:

(i) A proposed list of questions to be asked of the jury panel by the Court in voir dire examination.

(ii) A preliminary set of proposed instructions to the jury which identify relevant D.C. Bar form book instructions and the authorities relied upon for any special instructions proposed.

(iii) A proposed verdict form for a special verdict requested.

6. Defendant shall in addition include in the pretrial brief a response by corresponding number which shall admit, deny, or assert insufficient knowledge or information to either admit or deny each numbered statement of fact set forth in plaintiff's pretrial brief. Each denial shall be supported by appropriate counter-responses. See paragraph 5(b) above. Each assertion of insufficient knowledge shall describe pretrial efforts to obtain the knowledge by discovery, or otherwise.

7. Plaintiff shall on or before November 6 , 1981, file any reply to facts affirmatively stated in defendant's response, which shall, by corresponding number, admit, deny, or assert insufficient knowledge or information sufficient to admit or deny each numbered statement of fact set forth in defendant's brief. Such denials shall be supported and assertions of lack of knowledge explained. See paragraph 6 above. If defendant's pretrial brief asserts any new legal issues, such as an affirmative defense or counterclaim, plaintiff's reply shall, with respect to these issues only, take the form of a pretrial brief.

8. The Court expects each party to identify and either concede or join every issue of fact or law in the case and show the support, if any, for the position. If either party has any question about its responsibility for compliance with this order, that party should, by motion, request a conference with the Court in advance of the pretrial conference, with notice of the request to the opposing party or parties.

9. After defendant has filed a pretrial brief, counsel shall meet at mutually convenient times and places to exchange copies and premark originals of exhibits that they intend to offer at trial. Counsel shall consult with each other and attempt to anticipate and resolve all evidentiary issues which are likely to arise during the trial, including for example, the qualification of any expert witnesses listed in the pretrial briefs and the admissibility, relevancy and authenticity of exhibits. Counsel shall prepare and file with the Clerk on or before November 9, 1981, the following: (a) a joint statement listing and briefly describing the exhibits to be offered. The joint statement about exhibits shall note agreement or lack thereof as to the admissibility, relevancy, and authenticity of the exhibits. The parties shall attach to the joint statement about exhibits a joint appendix containing not more than 30 pages of copies, or excerpts from, the most meaningful exhibits; (b) a joint statement listing the evidentiary issues they have discussed and noting their agreement or lack thereof on the proper resolution of these issues; and (c) a brief argument on the admissibility, relevancy, and authenticity (with affidavits to support, if appropriate,) of exhibits insofar as these issues are not resolved by the joint statement. Counsel shall be prepared to argue evidentiary issues on which there is disagreement at the pretrial conference.

10. If refinement of the facts or issues in the course of discovery or pretrial preparation stimulates interest in a settlement, the Court is available to assist in that process.

11. Any fact, legal contention, claim for relief or defense (in whole or in part), evidentiary objection or affirmative matter not set forth in detail as provided above shall be deemed abandoned, uncontroverted, or withdrawn (as may be appropriate) in future proceedings, notwithstanding the contents of any pleadings or papers filed in the case, except for matters of which a party could not have been aware in the exercise of reasonable diligence at the time the pretrial brief was filed. Such a showing as to new matter shall be made by motion. If the Court grants the motion, a supplemental brief by leave of Court may be permitted.

12. A pretrial conference is scheduled for November 13, 1981 at 2:00 P.M., in Courtroom No. 3.

13. Counsel shall obtain from the Courtroom Clerk stickers for premarking exhibits and forms for listing exhibits. The exhibits shall be marked by counsel, and the completed lists of exhibits shall be delivered to the Courtroom Clerk, at least two days prior to trial.

14. Deviations from this pretrial order require prior leave of the Court.

15. Trial shall commence on November 23, 1981, in Courtroom No. 3, to continue for 20 days.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
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| JULIUS HOBSON, et al., | ) | |
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| | ) | No. 76-1326 |
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| Defendants. | ) | |
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PRETRIAL BRIEF OF FEDERAL DEFENDANTS

I. List of Witnesses

The federal defendants may call the following witnesses at trial:

1. All parties.

2. All persons listed as witnesses in plaintiffs' pretrial brief or called by plaintiffs at trial.

3. Robert L. Keuch will testify about the Federal Bureau of Investigation's domestic intelligence jurisdiction and investigative processes and techniques, including electronic surveillance. (2 hours)

4. Hilmer Krebs will testify about the activities of plaintiff Reginald Booker and about his investigation of plaintiff Booker. (1 1/2 hours)

5. Robert Finzel will authenticate Federal Bureau of Investigation documents and will also testify regarding the FBI's investigations of New Left activities. (2 hours)

6. John N. Mitchell will testify regarding the procedures for authorization of national security electronic surveillances in 1969 to 1972. (1 hour)

7. Bernard A. Wells will testify regarding COINTELPRO. (1 1/2 hours)

8. William N. Preusse will testify regarding FBI domestic intelligence investigations. (1 hour)

9. Charles Sawyer will testify about domestic intelligence investigations. (1 hour)

10. James F. Whalen will testify about domestic intelligence investigations. (1 hour)

11. John Stanley will testify about domestic intelligence investigations. (1 hour)

12. Terry O'Connor will testify about domestic intelligence investigations. (1 hour)

13. William T. Tucker will testify about domestic intelligence investigations. (1 hour)

14. Robert F. Olmert will testify about domestic intelligence investigations. (1 hour)

15. Mitchell Rogovin will testify about his knowledge of Robert Merritt's allegations. (1/2 hour)

II. Statement of Facts To Be Proven

1. Each plaintiff engaged in activities protected by the First Amendment to the Constitution of the United States, and no plaintiff was ever deterred from engaging in such activity or was punished for engaging in such activity due to the actions of any of the federal defendants. (All plaintiffs, Brennan, Moore, Grimaldi, Pangburn, Jones)

2. Defendants Brennan, Moore, Grimaldi, Jones, and Pangburn were not personally involved in the investigation of any plaintiff. (Brennan, Moore, Grimaldi, Jones, and Pangburn)

3. Each plaintiff who was investigated by the Federal Bureau of Investigation was engaged in activity which warranted and justified investigation. (All plaintiffs, Hilmer Krebs, excerpts of files pertaining to plaintiffs Abbott, Bloom, Booker, Eaton, Waskow, Pollock, Washington Peace Center, and Washington Area Women Strike for Peace)

4. Prior to July, 1973, information was available to each plaintiff which was sufficient to cause the plaintiff to believe he, she, or the organization had a potential cause of action against agents of the Federal Bureau of Investigation. (All plaintiffs, Exhibits attached to Motion by Federal Defendants for Judgment on the Pleadings, Exhibits attached to Motion by Defendant Terry O'Connor for Judgment on the Pleadings,

Depositions of plaintiffs as follows: Booker at 13, 32-34, 41, 43, 49, 58; Bloom at 16, 20, 28, 31-32, 37-38; Eaton at 17-18, 22; Waskow at 26; Pollock at 9, 10, 38; Abbott at 6, 10-11, 25, 28-31; Villastrigo (Woman Strike for Peace) at 50-56, 66-68.

5.a. In January, February, and March of 1972, articles by or about Robert Wall, former Special Agent of the Federal Bureau of Investigation, were published in The Washington Post, The Washington Star, The New York Times, and The New York Review of Books.

b. Each individual plaintiff and persons associated with each organizational plaintiff were aware of some or all of these articles or were aware of the disclosures made by Robert Wall relating to his activities in the FBI.

c. Plaintiff Arthur Waskow was personally acquainted with Robert Wall in 1971 and 1972 and talked with him regarding his activities in the FBI.

d. The disclosures made by Robert Wall in 1971 and 1972 were relied on by plaintiffs in commencing this civil action. (All plaintiffs, Exhibits to Motion by Federal Defendants for Judgment on the Pleadings, depositions by plaintiffs identified in paragraph 4, supra)

6.a. Plaintiff Arthur Waskow was aware by January, 1972, that Robert Merritt was an informant for the Federal Bureau of Investigation.

b. Persons associated with the Institute for Policy Studies and with plaintiff Arthur Waskow, and attorneys for the Institute of Policy Studies, including Mitchell Rogovin and Robert Herzstein, were aware by January 1972, that Robert Merritt was an informant for the Federal Bureau of Investigation. (Robert Merrit, Waskow, Exhibits to Motion by Defendant Terry O'Connor for Judgment on the Pleadings)

7. Plaintiffs Booker and Abbott were aware before July, 1973, that Harold Bynum had been an undercover officer for the Metropolitan Police Department. (Booker, Abbott, Bynum)

8. Plaintiff Bloom was aware prior to July, 1973, that Special Agents of the Federal Bureau of Investigation were investigating the National Mobilization Committee. (Bloom; record and proceedings in Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973))

9. Plaintiff Abbott was aware prior to July, 1973, that Special Agent Philip Wilson of the Federal Bureau of Investigation had been investigating his activities. (Abbott; excerpts of file pertaining to Abbott)

10. Defendant Brennan, Moore, Jones, Pangburn, and Grimaldi each believed that his actions at issue in this civil action were lawful and proper. In each instance, that belief was reasonable. (Brennan, Moore, Jones, Pangburn, Grimaldi; Sections 87, 107, and 122 of the FBI's Manual of Instructions; 18 U.S.C. § 2511(3); relevant case law relating to investigative activity, electronic surveillance, and use of informants; Memoranda from the Attorney General to the Director, FBI, dated September 14, 1967, May 6, 1969, and July 14, 1969; Memoranda between J. E. Hoover and J. Walter Yeagley dated May 1, 1968, June 17, 1968, September 19, 1968, and September 26, 1968; Memorandum from C. D. Brennan to W. C. Sullivan dated April 30, 1968)

## III. Response To Plaintiffs' Statement Of Facts To Be Proven

### A. Against The FBI Defendants

1.a. Admitted.

b. Admitted, except it is further averred that defendant Gerald Grimaldi was COINTELPRO-New Left Coordinator in the Washington Field Office for a period of time in 1968 and 1969. (Grimaldi)

c. Admitted that defendant Courtland Jones was the Security Coordinating Supervisor of the Washington Field Office from 1964 to 1974. Denied that he directed or approved all non-criminal activities in the WFO. Admitted that during a portion of the time he was Security Coordinating Supervisor he was in a supervisory capacity with respect to defendants Grimaldi and Pangburn. (Jones, Grimaldi, Pangburn)

d. Admitted that defendant George C. Moore was Chief of the Racial Intelligence Section of the Domestic Intelligence Division of the FBI from 1967 to 1974. The remainder of the paragraph is denied insofar as it purports to state that defendant Moore personally directed or approved any activity affecting plaintiffs Booker or Eaton. Defendant Moore admits that his section was responsible for supervision of the Counterintelligence Program--Black Nationalist--Hate Groups and for general supervision of racial matters investigations. Defendant Moore denies that all activities of his section were coordinated with the activities of the Internal Security Section of the Domestic Intelligence Section. (Moore)

e. Admitted that defendant Charles Brennan was Chief of the Internal Security Section of the Domestic Intelligence Division of the FBI from approximately December, 1966, to the Summer of 1970, and that he was the Assistant Director in charge of the Domestic Intelligence Division from the Summer of 1970 to September, 1971. Defendant Brennan denies the remainder of this paragraph except he admits that in his capacity as Assistant Director he was defendant Moore's supervisor. (Brennan)

2. Denied, except it is admitted that the FBI instituted a Counterintelligence Program sometimes referred to as COINTELPRO.

a. Denied, except it is admitted that organizations and individuals were targets of activity carried out pursuant to COINTELPRO. (Brennan, Moore, Grimaldi, Jones)

b. Denied with respect to plaintiffs Washington Peace Center and Washington Area Women Strike for Peace. It is admitted that certain organizations were targets of COINTELPRO, but it is denied that the program was a conspiracy and it is denied that defendants took any action which caused injury to any plaintiff. (Brennan, Moore, Grimaldi, Pangburn, Jones, all plaintiffs)

3.a. Denied, except it is admitted that defendant Moore recommended that information regarding the Poor People's Campaign be provided to news media personnel. (Moore)

b. Denied, except it is admitted that defendant Grimaldi wrote the memorandum proposing the submission of fictitious housing forms, and the proposal was approved at Federal Bureau of Investigation Headquarters. Defendants Jones and Brennan deny any personal involvement or knowledge of the matter, and defendant Grimaldi denies knowledge as to whether the proposal was implemented and denies personal involvement if it was implemented. (Brennan, Moore, Jones, Grimaldi)

c. Denied.

d. Defendants have moved to strike this paragraph. If response is required, it is denied.

e. Denied.

f. Defendants have moved to strike this paragraph. If response is required, it is denied.

g. Denied; except defendant Grimaldi admits that pursuant to the Counterintelligence Program directed by FBI Headquarters he prepared a document called the Rational Observer and caused it to be distributed on the campus of American University; defendant Jones admits that he approved the recommendation to print and distribute the Rational Observer, and the recommendation was approved by William C. Sullivan, Assistant Director, Federal Bureau of Investigation; and defendant Brennan denies any personal involvement in the recommendation, approval, or implementation of the activity. (Brennan, Jones, Grimaldi)

h. Defendants have moved to strike this paragraph. If response is required, it is denied.

i. Defendants have moved to strike this paragraph. If response is required, it is denied.

j. Defendants have moved to strike this paragraph. If response is required, it is denied.

k. Defendant Webster admits that FBI records, indicate that conversations of plaintiffs Eaton, Booker, Pollock, Bloom, Abbott, and Waskow were overheard during electronic surveillances authorized by the Attorney General of the United States. Defendant Moore admits that he, as well as others, was involved in the

recommendation that the FBI conduct electronic surveillance of the Black Panther Party in Washington, D.C., and he admits that the Attorney General authorized the electronic surveillance. Defendant Brennan admits that he, as well as others, was involved in the recommendation that the FBI conduct electronic surveillance of the Black Panther Party and the People's Coalition for Peace and Justice in Washington, D.C., and he admits that the Attorney General authorized the electronic surveillance. Defendants aver that the electronic surveillances were based on good cuase and were in compliance with existing procedural and legal requirements. Defendants deny personal knowledge that any plaintiff was overheard on these electronic surveillances. (Phillip Mostrum, Brennan, Moore, Jones)

l. Defendants have moved to strike this paragraph. If response is required, it is denied.

m. Denied.

n. Denied, except it is admitted by defendant Webster that the names of certain plaintiffs were included on the Security Index or the Administrative Index, and it is further averred that no plaintiff was summarily arrested and detained without charge by the Federal Bureau of Investigation. (Phillip Mostrum, all plaintiffs)

4. Denied.

B. Against the D.C. Defendants

This portion of plaintiffs' statement of facts does not pertain to the federal defendants, and no response by the federal defendants is required.

C. Against All Defendants

1. Denied.

2. Denied.

IV. Legal Contentions

1. The statute of limitations applicable to this civil action prescribes a limitations period no longer than three years.

a. Title 12, D.C. Code, Section 301.

b. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974).

*c. Hobson v. Wilson, Civil Action No. 76-1326 (D.D.C., November 9, 1979).

2. Plaintiffs bear the burden of proving fraudulent concealment if they are to avoid the bar imposed by the statute of limitations. To prove fraudulent concealment, plaintiffs must prove that (1) the information fraudulently concealed was material, (2) the fraudulent concealment precluded plaintiffs from acquiring knowledge of the material facts, (3) plaintiffs did not know and by the exercise of due diligence could not have known, that they may have had a cause of action, and (4) the defendants had an affirmative duty to disclose information to plaintiffs or defendants had taken affirmative action to conceal facts which, if known, would have alerted plaintiffs that a cause of action existed.

*a. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), affirmed, 553 F.2d 220 (D.C. Cir. 1977).

b. General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979).

c. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir., 1979).

3. A civil conspiracy is not in itself actionable. Rather, a cause of action arises only if there is a conspiracy to do an unlawful act or to act in an unlawful manner, and an overt act is taken which injures the plaintiffs.

a. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974).

*b. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

4. To establish entitlement to damages from the individual defendants under 42 U.S.C. § 1985(3), plaintiffs must prove that (1) two or more persons conspired for the purpose of depriving plaintiff of the equal privileges and immunities under the laws; (2) there was an act in furtherance of the object of the conspiracy which injured plaintiffs in their persons or property or deprived them of having and exercising any right or privilege of a citizen of the United States; and (3) the motivation for the conspirators' actions was "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."

*a. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

5. Investigative activity by government law enforcement agents which does not cause specific, objective harm or threaten specific future harm does not violate the constitutional rights of plaintiffs. Allegations or proof of subjective "chill" of the exercise of rights is not compensable in damages.

*a. Laird v. Tatum, 408 U.S. 1 (1972).

b. Fifth Avenue Peace Parade v. Gray, 480 F.2d 326 (2nd Cir. 1973).

*c. Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co., 593 F.2d 1030, 1052 (D.C. Cir. 1978).

6. Use of informants by law enforcement authorities is not actionable and does not trench upon any rights guaranteed by the Constitution of the United States. In the absence of a specific incident of misconduct by an informant, resulting in specific injury, in which the informant was acting under the direction and control of a defendant, there is no violation of constitutional rights.

*a. Handschu v. Special Services Division, 349 F. Supp. 766, 769 (S.D.N.Y. 1972).

b. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 153-54 (D.D.C. 1976).

*c. Socialist Workers Party v. Attorney General, 565 F.2d 19 (2nd Cir. 1977).

7. To be held personally liable in damages to plaintiffs, a federal officer must be proven to have personally participated in or directed the commission of the act which caused judicially cognizable injury to the plaintiff.

*a. Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976).

b. Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1976).

c. Robertson v. Sichel, 127 U.S. 507 (1888).

8. A claim of mental and emotional distress is not actionable under the civil rights statute, 42 U.S.C. §§ 1983, 1985(3).

*a. Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972).

b. Dear v. Rathje, 391 F. Supp. 1 (N.D. Ill. 1975).

c. Taylor v. Nichols, 409 F. Supp. 927 (D. Kan. 1976).

9. A federal officer may not be held liable in damages to plaintiff if he proves that (1) he believed in good faith that his conduct was lawful, and (2) his belief was reasonable.

*a. Bivens v. Six Unknown Named Agents, 456 F.2d 1339, 1348 (2nd Cir. 1972).

b. Procunier v. Navarette, 434 U.S. 555 (1978).

10. With regard to warrantless electronic surveillances authorized by the Attorney General for purposes of protecting the national security, the holding of United States v. United States District Court, 407 U.S. 297 (1972) may not be retroactively applied to hold a federal officer civilly liable in damages.

*a. Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978); But see, Zweibon v. Mitchell, 606 F.2d 1172 (1979).

11. The Federal Bureau of Investigation has authority to conduct domestic intelligence investigations.

*a. United States v. United States District Court, 407 U.S. 297, 310 (1972).

b. United States v. Barsky, 167 F.2d 241 (D.C. Cir. 1948).

*c. 28 C.F.R., Section 0.85(d).

12. Plaintiffs are entitled only to compensatory damages for any violation of their constitutional rights.

*a. Carey v. Piphus, 435 U.S. 247 (1978).

## V. Narrative Statement of the Law and Facts

This civil action was commenced on July 16, 1976, by individuals and organizations claiming to have been active during the late 1960's and early 1970's in various political activities in the District of Columbia designed to express their discontent with governmental policies and to bring their views to the attention of the public and of government authorities of both the District of Columbia and the United States.

The plaintiffs allege that from 1968 to 1973 the defendants engaged in certain categories of activities affecting the plaintiffs:

(1) using undercover agents to fraudulently gain entry to private meetings to learn the plans and programs of plaintiffs; (2) electronic surveillance without judicial authorization; (3) breaking and entering to obtain membership lists and other private political documents; (4) mail interception; (5) physical surveillance, that is, surreptitiously following plaintiffs or monitoring plaintiffs' political activities; and (6) disrupting and interfering with plaintiffs' political activities by (a) urging violent or unlawful actions and (b) supplying the public and/or news media with false information about the plaintiffs and their plans. [Amended Complaint, ¶¶27-29].

Plaintiffs allege that their cause of action is based on the First, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States, 42 U.S.C. §§ 1985(3) and 1986, the United States and District of Columbia statutes governing the interception of oral communications, and common law of trespass, conversion, and invasion of privacy. Jurisdiction is alleged under 28 U.S.C. §§ 1331, 1343, 1337, and 1355.

In the Amended Complaint, plaintiffs named approximately forty Special Agents and officials of the Federal Bureau of Investigation as defendants. Of those, only five remain as defendants: Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould Pangburn, and Gerald T. Grimaldi.

During the period relevant to the subject matter of this civil action, defendants Brennan and Moore were assigned to Federal Bureau of Investigation Headquarters. Defendant Brennan was the Chief of the Domestic Intelligence Division from approximately December, 1966, to the Summer of 1970. From the Summer of 1970 to September, 1971, he was the Assistant Director in charge of the Domestic Intelligence Division. Defendant Moore was, from 1967 to 1974, Chief of the Racial Intelligence Section of the Domestic Intelligence Division.

Defendants Jones, Pangburn, and Grimaldi were, during at least a portion of the relevant time period, assigned to the Federal Bureau of Investigation's Washington Field Office. From 1964 to 1974, defendant Jones was the Security Coordinating Supervisor for

the Washington Field Office. In that capacity he had overall supervisory responsibility for all intelligence gathering activities, including internal security and foreign counterintelligence matters, carried out by that office. Defendant Pangburn was, for a period of time, assigned to conduct internal security investigations and from May, 1972, to October, 1974, was supervisor of the squad in that office having responsibility for investigating racial matters and extremist organizations. Defendant Grimaldi was assigned in or around May, 1968, to be the field office's "coordinator" of the program instituted by the Director of the FBI to disrupt the New Left. He was the designated "coordinator" during 1968 and 1969 in addition to his other investigative assignments. From April, 1971, to April, 1972, defendant Grimaldi was the supervisor of the squad having responsibility for investigating racial matters and extremist organizations.

A. The Action Is Barred By The Statute of Limitations

No federal statute of limitations governs limitations of actions brought under the Civil Rights Act of 1871, 42 U.S.C. § 1981 et seq., or under the rationale of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971); therefore, the Court must look to the appropriate period stated in a statute of local application.*/ Shifrin v. Wilson, 412 F. Supp. 1282, 1301 (D.D.C. 1976).

In the District of Columbia, the period of limitations applicable to this action is not longer than three years. Section 301(8), Title 12, D.C. Code, provides a three year limitations period for claims ". . . for which a limitations period is not otherwise specifically prescribed."

The activity of which plaintiffs complain allegedly occurred from 1968 to 1973 and the Complaint was not filed until July, 1976. No defendant is alleged to have committed any act subsequent to July 16, 1973, and no act, regardless of by whom committed, is

*/ The exception to this situation is 42 U.S.C. § 1986, which has a specifically stated one year limitations period.

alleged to have occurred subsequent to July 16, 1973. The face of the complaint shows, therefore, that the action is barred by the statute of limitations.

Plaintiffs have no apparent means of avoiding the bar imposed by the statute of limitations. Plaintiffs have the affirmative obligation of alleging and proving fraudulent concealment if they are to avoid the bar imposed by the statute of limitations. See Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), affirmed, 553 F.2d 220 (D.C. Cir. 1977).

In addition, plaintiffs must show either that defendants had an affirmative duty to disclose information or that they took affirmative action to conceal material facts. Silence does not constitute fraudulent concealment. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979); General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 8 (D.D.C. 1979).

Not only have plaintiffs not demonstrated that defendants had an affirmative duty to disclose information to them, but also they cannot escape their own duty to exercise "due diligence." Moreover, the record of this action, including specifically the responses of plaintiffs to discovery, indicates that more than three years prior to the commencement of this action plaintiffs possessed the material facts to form the basis for intelligent prosecution of their claims. See Emmett v. Eastern Dispensary Casualty Hospital, 396 F.2d 931, 937 (D.C. Cir. 1967). Their failure to bring a timely action cannot be excused and it should be dismissed.

### B. Defendants May Be Held Liable Only For Acts In Which They Were Personally Involved

Many of plaintiffs' allegations pertain to activity in which the defendants alleged to be liable were not personally involved. Plaintiffs' theory of recovery in these instances is apparently based on the false proposition that a superior or associate of another Special Agent is liable for the actions of the other agent.

The law is established that, absent some degree of direct responsibility, a federal official will not be held liable in damages for the wrongdoing of subordinates. The policy supporting

this rule was enunciated by the Supreme Court in Robertson v. Sichel, 127 U.S. 507 (1888):

> [T]o permit recovery against the [superior] . . . would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

127 U.S. at 515.

In Green v. Laird, 357 F. Supp. 227 (N.D. Ill. 1973), a suit against federal officers, the court said:

> To hold these defendants liable on the theory of respondeat superior would ultimately transform this into a suit against the United States, which is immune from suit under the doctrine of sovereign immunity under 28 U.S.C. 2680(a) . . . . [P]ersonal involvement is required to hold federal supervisory personnel liable for the acts of their subordinates.

357 F. Supp. at 230.

In a case involving two former Special Agents in Charge of the Denver, Colorado, Division of the Federal Bureau of Investigation, Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976), the court upheld a directed verdict in favor of the defendants where the evidence failed to show that "any defendant instigated the investigation of plaintiff, directed its course, participated or acquiesced therein." 546 F.2d at 338. Citing Rizzo v. Goode, 423 U.S. 362 (1976), the court held that "before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have participated or acquiesced in the constitutional deprivations of which complaint is made." 546 F.2d at 337.

Proof of personal participation to hold federal officers personally liable in damages has also been required by the Courts in Black v. United States, 534 F.2d 524, 527-28 (2nd Cir. 1976); Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1976); Tucker v. Duke, 276 F.2d 499 (D.C. Cir. 1960); Jackson v. Wise, 385 F. Supp. 1159, 1163 (D. Utah 1974); and Byrd v. Warden, Federal Detention Headquarters, 376 F. Supp. 37, 39 (S.D.N.Y. 1974).

### C. The Federal Bureau of Investigation Has Authority To Investigate Matters Relating To The National Security

The authority of the Federal Bureau of Investigation to conduct ongoing domestic intelligence investigations has both constitutional and statutory foundations.

The Supreme Court, in United States v. United States District Court, 407 U.S. 297 (1972), observed that:

> [T]he President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. 407 U.S. at 310.

To perform this duty properly and adequately the President and the appropriate departments and agencies must rely on a broad range of intelligence information, for only by inquiring into potential threats may the Government be prepared to protect itself against the clear and present threats. Cf., Dennis v. United States, 341 U.S. 494, 509 (1951); United States v. Barsky, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).

The statutory basis for the Federal Bureau of Investigation's assignment and activities in gathering domestic intelligence information may be found in the numerous Federal criminal statutes dealing with, for example, treason, espionage, sabotage, sedition, advocacy of violent overthrow of the Government, civil disorders, and riots. In addition, the responsibilities imposed upon the Federal Bureau of Investigation by the various Federal personnel loyalty and security programs, e.g., 5 U.S.C. § 1304, 50 U.S.C. App. § 2255, 42 U.S.C. § 2165, 42 U.S.C. § 2455, 22 U.S.C. § 2519, and 22 U.S.C. § 2585; by the National Security Act of 1947, 50 U.S.C. §§ 401 et seq.; and by the Immigration and Naturalization Act of 1952, 8 U.S.C. §§ 1101 et seq., require, and establish the basis for, the conduct of ongoing domestic intelligence operations commensurate with the purposes to be accomplished.

By virtue of the delegation of responsiblity to him by the President and by Congress, the Attorney General shares in both the effectuation of the President's relevant constitutional duties and

the enforcement of the regulatory and penal acts of Congress. The Attorney General's power of delegation to the Federal Bureau of Investigation rests directly upon the authority of section 533, title 28, U.S.C., as well as the general provisions of 28 U.S.C. §§ 509, 510, and 5 U.S.C. § 301. Section 533 authorizes the Attorney General to appoint officials "to detect and prosecute crimes against the United States," and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." By regulation, 28 C.F.R. § 0.85, the Attorney General has directed the Federal Bureau of Investigation to investigate violations of the laws of the United States and to conduct personnel investigations pertinent to the loyalty and security program. In addition, section 0.85(d), 28 C.F.R., directs the Federal Bureau of Investigation to carry out the Presidential directives "to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters."

Within this framework of authority, the Federal Bureau of Investigation conducted the investigation of the plaintiffs.

### D. Investigative Activity Itself Does Not Violate Plaintiffs' Constitutional Rights

Plaintiffs allege that the defendants conducted investigations of plaintiffs which were longer in duration and more intense in degree than necessary for any proper law enforcement function. In addition to the fact that none of the present federal defendants were engaged in any direct investigation of any plaintiff, plaintiffs identify no occasions, events, or actions in which a defendant caused injury to a plaintiff. Plaintiffs also describe no occasions in which they were deprived of the enjoyment of a constitutional right or prohibited from, or punished for, the exercise of a constitutional right. Their activities prove, in fact, that they freely and without fail organized and participated in demonstrations, gave public speeches, and in general fully exercised and enjoyed their rights.

Plaintiffs' allegations of a subjective "chill" of their rights, or interference with the rights of others, are not actionable. They must allege and prove direct interference, present objective harm, or the specific threat of objective future harm to recover damages from defendants. Laird v. Tatum, 408 U.S. 1 (1972); Fifth Avenue Peace Parade Committee v. Gray, 480 F.2d 326 (2nd Cir. 1973); Donohue v. Duling, 465 F.2d 196 (4th Cir. 1972). Nor does the fact that plaintiffs were engaged in activity protected by the First Amendment make them immune from investigations. Reporters Committee for Freedom of the Press v. ATT, 593 F.2d 1030 (D.C. Cir. 1978).

Moreover, the use of informants by law enforcement authorities is not itself actionable and does not trench upon any rights guaranteed by the Constitution of the United States. As at least one court has recognized in the context of civil litigation,

> the use of secret informers or undercover agents is a legitimate and proper practice of law enforcement--indeed, without the use of such agents many crimes would go unpunished and wrongdoers escape prosecution . . . . The use of informers and infiltrators by itself does not give rise to any claim of violation of constitutional rights.

Handschu v. Special Services Division, 349 F. Supp. 766, 769 (S.D.N.Y. 1972) (emphasis supplied). Similarly, the United States Court of Appeals for the Second Circuit has noted that

> the FBI has a right, indeed a duty, to keep itself informed with respect to the possible commission of crimes; it is not obligated to wear blinders until it may be too late for prevention.

Socialist Workers Party v. Attorney General, 510 F.2d 253, 256 (2nd Cir. 1974).

In the absence of specific incidents of misconduct, plaintiffs do not state a cause of action relating to the alleged use of informants. Surveillance by informants, whether overt or covert, does not violate any constitutional rights. Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 153-54 (D.D.C. 1976), remanded on other grounds, No. 76-1647, decided March 19, 1979 (D.C. Cir.). See Hoffa v. United States, 385 U.S. 293, 311 (1966); United States v. White, 401 U.S. 745, 749 (1971).

E. Plaintiffs Cannot Establish The Elements Necessary To Recover Under 42 U.S.C. § 1985(3)

Plaintiffs have alleged that the federal defendants entered into a conspiracy among themselves to injure plaintiffs. They do not allege, however, any details of the conspiracy, such as when it was formed, who participated it, and what was the nature of the agreement.*/ The only factor connecting the federal defendants is that they were employed by the Federal Bureau of Investigation, but there was never an occasion in which all five were tied together in any common enterprise, and there was never an occasion in which any were doing anything other than carrying out duties and obligations imposed by policies established by their superiors.

The cause of action based on conspiracy is brought pursuant to 42 U.S.C. § 1985(3). Establishment of a claim under that statute requires proof of these essential elements: (1) two or more persons must have conspired for the purpose of depriving plaintiff of the equal protection of the laws, or of equal privileges and immunities under the laws; (2) there must have been an act in furtherance of the object of the conspiracy which injured plaintiff in his person or property or deprived him of having and exercising any right or privilege of a citizen of the United States; and (3) the motivation for the conspirators' actions must have been "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

Plaintiffs fail to establish these elements. A civil conspiracy is a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Ammlung v. City of Chester, 494 F.2d 811 (3rd Cir. 1974). For the conspiracy to exist, there must be some express or implied agreement among the conspirators in the object of the conspiracy. See Morton Buildings of Nebraska, Inc. v.

*/ Plaintiffs have also, from time to time, alleged a conspiracy between the federal defendants and the D.C. defendants. Plaintiffs are silent with regard to the details of this alleged conspiracy.

Morton Building, Inc., 531 F.2d 910, 917 (8th Cir. 1976). It is required that there be some bond among the conspirators, beyond mere association or common employment, constituting agreement, unity of purpose, or common design. Tyrrell v. Taylor, 342 F. Supp. 9 (E.D. Pa. 1975).

In addition, the courts have held that there is no conspiracy where the act complained of is essentially the act of a single entity. Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). If the actions complained of here are deemed to be the fruit of concerted action of two or more individuals, it must also be recognized that they were the result of the collective judgment of individuals acting as representatives of a single entity, the Federal Bureau of Investigation. Conspiracy among agents of a single entity is not sufficient to support a cause of action under 42 U.S.C. § 1985(3). Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1370 (W.D. Pa. 1977); Keddie v. Pennsylvania State University, 412 F. Supp. 1264 (M.D. Pa. 1976).

Plaintiffs have failed to allege that the so-called conspiracy was motivated by any class-based animus. Plaintiffs have thus expressed an intention not to prove an essential element of her conspiracy claim and it should be dismissed. Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 324 (D.N.J. 1978).

Even if plaintiffs had made formally correct allegations, they cannot establish this necessary element of a claim under 42 U.S.C. § 1985.*/ "Invidiously discriminatory animus," as a state of mind, implies malice, ill-will, or hatred against a group or class which is intense enough to invest an individual's actions toward the group with an improper motive. The test is not met by showing that an individual lacks affection or even harbors some resentment or dislike for the class. The animus must be so strong as to

*/ Although the courts are generally holding that certain non-racial classes may be appropriate where claims are made under 42 U.S.C. § 1985(3), see, e.g., Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973), a class consisting of all persons who disagree with the political and economic policies of the government is too vague to satisfy the requirement of the statute, see Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973). See also Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 324 n. 13 (D.N.J. 1978).

constitute a significant or deciding element in the conception and execution of the act complained of. As stated in Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972),

> [A] conspiracy claim based upon 42 U.S.C. 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination between classes or individuals."

462 F.2d at 113.

Finally, plaintiffs must prove that there occurred an overt act in furtherance of the object of the conspiracy which injured them in their person or property or deprived them of having and exercising any right or privilege of a citizen of the United States. Plaintiffs allege no such injury.

The conspiracy claim therefore fails for the reason that (1) defendants did not engage in a conspiracy, (2) defendants were not motivated by an invidiously discriminatory animus against plaintiffs, and (3) no plaintiffs were deprived of having and exercising any right or privilege of a citizen of the United States.

### F. Defendants Are Not Liable In Damages For Electronic Surveillance

Certain of the plaintiffs were overheard on electronic surveillances authorized by the Attorney General of the United States for the purpose of obtaining information deemed by him to be necessary to protect against the overthrow of the Government by force or other unlawful means or against a clear and present danger to the structure or existence of the Government

Defendants Moore and Brennan were, at various times, involved in the recommendation for the electronic surveillances at issue; however, in each instance they were following procedures established by the Attorney General and the Director of the Federal Bureau of Investigation, and, in each instance, the recommendations were approved by the Director and the Attorney General.

It is true that the procedures involved in authorizing and conducting warrantless electronic surveillances for domestic intelligence purposes were declared to be in violation of the Fourth Amendment in United States v. United States District Court, 407 U.S. 297 (1972). The electronic surveillances at issue here

were conducted prior to that decision, and defendants Moore and Brennan, as subordinate officials of the FBI, were obligated to act in accordance with the procedures and policies imposed by the Attorney General. Consequently, they should not be held liable in damages for their subordinate role in the execution of the electronic surveillances:

> [T]here is . . . a legal obligation on the part of employees of the Justice Department to carry out the directives of their superiors when those superiors assure them their actions are legal. I think it would be unrealistic to suppose that employees of the Justice Department should be forced to choose between termination of employment for refusal to follow directives and maintenance of a correct view of constitutional duties in opposition to the incorrect view of superiors. Civil disobedience within the Department is highly unlikely and we may doubt whether it should be encouraged.

Zweibon v. Mitchell, 516 F.2d 594, 675, 678-79, fn. 12 (D.C. Cir. 1975) (Bazelon, J., concurring).

Furthermore, the holding in United States v. United States District Court, supra, should not be retroactively applied for purposes of holding these defendants liable in damages. This precise issue was addressed in Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978):

> [R]etroactively applying Keith [U.S. v. U.S. District Court] to create civil liability when the result of that decision was not clearly foreshadowed would be as inequitable as ex post facto criminal liability. [Former Attorney General John Mitchell] asserts that to hold him personally liable for exercising his statutory responsibility to evaluate and act upon an uncertain area of the law would be nothing short of punitive. We agree.

588 F.2d at 278. But see Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979).

### G. Each Federal Defendant Is Immune From Liability In Damages

Each of the defendants believed in good faith that his actions were lawful, and his belief in this regard was reasonable. Accordingly, none of the defendants is liable in damages to plaintiff.

In Bivens v. Six Unknown Named Agents, 456 F.2d 1339 (2d Cir. 1972), the Court recognized that federal officers are entitled to plead good faith as a defense in a civil action alleging the depri-

vation of constitutional rights. As the Court stated, "At common law the police officer always had available to him the defense of good faith and probable cause, and this has been consistently read as meaning good faith and 'reasonable belief' in the validity of [his challenged actions]." 456 F.2d at 1347. In establishing this defense the Court made the following observation:

> Therefore, to prevail the police officer need not allege and prove probable cause in the constitutional sense. The standard governing police conduct is composed of two elements, the first is subjective and the second is objective. Thus, the officer must allege and prove not only that he believed in good faith that his conduct was lawful, but also that his belief was reasonable. And so, we hold that it is a defense to allege and prove good faith and reasonable belief in the validity of the arrest and the search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted. 456 F.2d at 1348.

The concurring opinion explained that this "lesser standard" is proper because Federal officers cannot be expected to foresee what determination a federal judge will later make. Bivens, supra, at 1348, 1349 (Lombard, J., concurring).

In this instance, if the federal defendants' conduct is held to be illegal, it would be because of a judical determination which defendants could not have predicted, viz., that the Federal Bureau of Investigation has no lawful authority to investigate for national security purposes or that the particular investigative acts were for some reason unlawful. Defendants should not be civilly liable where their own conduct was non-intrusive and reasonably believed to be legal. As the court stated in Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965):

> [T]he actions of a police officer cannot be tortious when the officer proceeds on the basis of his reasonable good faith understanding of the law and does not act with unreasonable violence or subject the citizen to unusual indignity. The facts alleged in the complaint demonstrate conclusively that the defendant could not reasonably have foreseen that a deprivation of constitutional rights might have resulted from his conduct. Under such circumstances the complaint must be dismissed. 237 F. Supp. at 829.

See also Tritsis v. Backer, 355 F. Supp. 225 (N.D. Ill. 1973), affirmed, 501 F.2d 1021 (7th Cir. 1974).

## Conclusion

The federal defendants are entitled to judgment in their favor.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
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| JULIUS HOBSON, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 76-1326 |
| JERRY WILSON, et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

MEMORANDUM BY FEDERAL DEFENDANTS
ON THEIR DEFENSES

This Court, by instruction of November 18, 1981, requested the federal defendants to address certain issues relating to their defenses in this civil action, including absolute and qualified immunity and the statute of limitations. The Court also requested the federal defendants to set forth their position on plaintiffs' claims of invasion of privacy and mental distress.

This memorandum will address these issues as well as others pertinent to this civil action.

A. Summary Of Plaintiffs' Claims And Defendants' Basic Defense

The apparent fundamental element of plaintiffs' cause of action is an alleged conspiracy among defendants Brennan, Moore, Jones, Grimaldi, and Pangburn to engage in activity to defeat or interfere with the rights of the plaintiffs. Plaintiffs further allege that pursuant to this conspiracy each of these defendants committed overt acts which interfered with plaintiffs' first amendment right of association and their "right of privacy."

The federal defendants deny, of course, that they were engaged in a conspiracy. For the most part the defendants did not work together but were, instead, distributed through a reasonably well-defined bureaucratic structure made up of several hundreds of persons. The only common threads tying the defendants together was their employment with the Federal Bureau of Investigation and their obligation to carry out their respective duties established by their superiors, including the Director of the FBI and the Attorney General.

A summary of the defendants' factual contentions will suffice for purposes of this memorandum. None of the federal defendants was directly involved in the investigation of any plaintiff. The only investigative activity at issue in this action personally engaged in by any defendant is the receipt by defendant Pangburn of informant reports relating to the Black United Front. He is also alleged to have engaged in intimidating interviews, but the identities of persons interviewed or the occasions on which such interviews occurred has not been described in plaintiffs' submissions to this Court. No plaintiff alleges personal intimidation by defendant Pangburn or any other defendant.

The only activity defendant Grimaldi was personally involved in was the preparation and distribution of The Rational Observer, an anonymous newsletter. He also prepared various memoranda relating to certain acts about which plaintiffs complain, but his participation in these matters was essentially that of an amanuensis, preparing memoranda for transmission to FBI Headquarters regarding proposals devised by other agents pursuant to the counterintelligence program ordered by the Director of the FBI. He neither created nor implemented such proposals which, in any event, were in all cases subject to the approval or disapproval of FBI Headquarters.

Defendant Jones was the Security Coordinating Supervisor at the Washington Field Office, in which capacity he supervised approximately 200 agents distributed among the nine squads responsible for all foreign and domestic intelligence activity in that office. His initials appear on some, but not all, of the memoranda relating to counterintelligence activities at issue in this action. He probably initialed documents relating to recommendations for electronic surveillance of the Black Panther Party and the People's Coalition for Peace and Justice. These recommendations were prepared in accordance with directives from the Director, and in each case the recommendations were subject to the approval of the Attorney General.

Defendant Moore was chief of the racial section at FBI Headquarters. His personal involvement in matters relevant to this action is limited to his forwarding of recommendations to his supervisors that certain information regarding the Poor People's Campaign be provided to the press. He also forwarded recommendations to his supervisors regarding electronic surveillance of the Black Panther Party. In both of these matters he was following procedures established by his superiors and, in each case, the recommendation was subject to the approval of his supervisors.

Defendant Brennan's role in this civil action is based on the fact that the memorandum creating the COINTELPRO-New Left was prepared in the section of which he was chief. His testimony will show that this program was the idea of, and was created at the direction of, defendant Brennan's superior in the FBI, William C. Sullivan. Defendant Brennan had no personal involvement in any activity complained of by plaintiffs except that he forwarded to his superiors recommendations for electronic surveillances at issue in this action. In each instance of electronic surveillance he was following procedures established by the Attorney General, and, in each instance, the surveillance was approved by the Attorney General.

B. Absolute Immunity

Plaintiffs have asserted a cause of action based on what they contend is the common law tort of invasion of privacy. Whether or not such a tort exists, the law of this circuit is that federal officers performing discretionary acts within the scope of their employment are absolutely immune from liability for alleged commission of common law torts. Sami v. United States, 617 F.2d 755, 770-73 (D.C. Cir. 1979). Applying the considerations discussed in Sami, the present defendants are absolutely immune from liability on the claim of common law tort of invasion of privacy. This is not an action involving false arrest or imprisonment by a law enforcement officer for which only a restrictive immunity is traditionally granted. No rationale exists in the facts of this action to justify departure from the salutary rule of Sami.

C. Qualified Immunity

The defense of qualified, or good faith, immunity is available to federal officers alleged to have committed "constitutional torts." Sami, supra. The defense comes into issue only when plaintiffs have established injury to their constitutional rights as a result of acts committed or personally directed by a defendant. The defendant is then accorded immunity from liability if he can establish that he believed in good faith that his actions were lawful, and his belief was reasonable. Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972).

With regard to any act for which plaintiffs establish a prima facie case of intrusion of their constitutional rights, each defendant shown to have participated in the act will testify as to the grounds for his belief, including past practices, directives or instructions from superiors, his understanding of the law, and his personal appreciation of the intrusion caused by his actions. In addition, on particular issues supplemental testimony and exhibits will be offered to demonstrate that the subjective good faith belief was reasonable.

With regard to the use of informants as an investigative technique, defendants will offer evidence of the law at the time. The Supreme Court had addressed the issue and had found that receipt of information from an informant was not violative of constitutional rights. Hoffa v. United States, 385 U.S. 293, 311 (1966); United States v. White, 401 U.S. 745, 749 (1971).

With regard to warrantless electronic surveillance for national security purposes, defendants will offer documents demonstrating the directives of the Attorney General, as well as the Attorney General's opinion on the legality of such surveillances. Expert testimony may be offered for purposes of explaining the evolution of the law of electronic surveillance from 1967 to 1974 and describing the activities of the Justice Department in guiding and responding to that evolution. Testimony in this regard will refer to significant Supreme Court decisions during the period, including Katz v. United States, 389 U.S. 347 (1967), and United States v. United States District Court, 407

U.S. 297 (1972); lower court decisions addressing the issue; and the language of the principal statute involved, 18 U.S.C. § 2511(3).

With regard to the Federal Bureau of Investigation's authority to conduct domestic intelligence investigations, the defendant will offer Department of Justice directives, FBI instructions, and testimony to describe the purposes and value of such investigations.

D. Statute of Limitations

Federal defendants have previously presented their arguments and facts pertinent to the issue of the statute of limitations. The outline of the federal defendants' evidence is as follows.

Plaintiffs have alleged no act occurring within the limitations period calculated as the three years preceding the commencement of this action on July 16, 1976. Plaintiffs have also made no offer of evidence to demonstrate fraudulent or deliberate concealment by the defendants, and plaintiffs' counsel has conceded that plaintiffs will offer no evidence of due diligence prior to April, 1976.

In addition, federal defendants will demonstrate that prior to July 16, 1973, plaintiffs had facts and knowledge sufficient to lead them to believe they may have had a cause of action against agents of the FBI. To prove this, federal defendants will rely on the deposition testimony of the plaintiffs, each of whom describes personal experiences, beliefs, and suspicions leading him or her to believe (1) that the FBI was generally investigating the types of persons and groups with whom the plaintiffs associated, and (2) that he or she was an individual target of FBI interest. (A summary of this testimony is included in Plaintiffs' Memorandum in Response to Order of October 29, 1981.) In addition, federal defendants will offer newspaper articles published in 1972 which plaintiffs admit they read and which were the basis for filing this action. The federal defendants have also referred to and will introduce additional facts, of which plaintiffs may not have been personally aware but which were available to the public in

general, demonstrating actual investigative activity and public perceptions of investigative activity. On this point defendants will offer the opinion in Fifth Avenue Peace Parade v. Gray, 480 F.2d 326 (2d Cir. 1973), and an article by Frank Donner: Spying for the FBI, published in the New York Review of Books, April 22, 1971.

In an effort to refute the federal defendants' factual contentions regarding plaintiffs' knowledge and well-founded beliefs, plaintiffs' counsel has asserted that the requisite facts were not known until publication of the Church Committee Report in April, 1976, and it further appears that many of the events now constituting part of the cause of action were not discovered until after the action was filed.

The first assertion is false, and it is demonstrated to be false by the fact that no plaintiff stated at deposition that the Church Committee Report was the occasion upon which suit began to be contemplated, the plaintiffs based none of their original allegations on the Report, and the decision to commence the action had actually been made prior to publication of the Report. Furthermore, in the latest submissions detailing plaintiffs' factual contentions, each of them admits to only "constructive" knowledge of the Church Committee Report. It is inconsistent to argue that the commencement of the action was motivated by a document of which no one had actual knowledge.

The second assertion is beside the point. The issue is whether and when plaintiffs had, or should have had, sufficient basis to file suit. The issue may be drawn thusly: What facts served as the basis for commencement of this action in July, 1976, and when did plaintiffs have those facts? Their testimony indicates that the relevant facts were available to them by at least March, 1972.

An additional consideration in this regard is the function and purpose of notice pleading. Plaintiffs filed an admittedly vague Complaint and then argued that more specific pleading was not possible because the relevant details were in the possession of the defendants. The Court agreed with this proposition in the Order of November 9, 1979. If plaintiffs are to be permitted to file a vague, conclusory pleading, then they should be bound by a limitations period which commences when they have sufficient

information to file such a pleading. It would seem peculiarly unfair for plaintiffs to assert that they can commence an action based on few, if any, facts and simultaneously claim that the limitations period does not start to run until they come into actual possession of facts proving each element of the cause of action.

### E. Plaintiffs' Claims Of Constitutional Right Of Privacy And Mental Distress

Plaintiffs claim that the defendants' actions toward them violated rights of privacy guaranteed by the Constitution of the United States.

The Constitution does not provide a specific guarantee of privacy, and the Supreme Court has ruled that only certain limited activities enjoy constitutional protection.*/ Those activities entitled to protection under the Constitution from governmental intrusion are those comprising the most intimate aspects of a person's life: matters relating to marriage, the decision to have children, contraception, family relationships, and the rearing and education of children. Rosenberg v. Martin, 478 F.2d 520, 524-25 (2nd Cir. 1973).

The purpose of this constitutional privacy protection is to leave a person free to make decisions about those aspects of personal life without being forced or penalized in his decision by governmental intrusion. These personal matters are not, however, given protection under the Constitution where a person voluntarily divulges them to a friend or confidante who in turn provides information to a Government official,**/ nor are matters that a person divulges in a way that makes them accessible to the public, even in his own home or office, recognized as being private under the Constitution, even when they reflect unfavorably on a person's reputation and concern matters that he claims are confidential in nature.***/

*/ Carey v. Population Services International, 431 U.S. 678, 684-85 (1977); Whalen v. Roe, 429 U.S. 589 (1977); Paul v. Davis, 424 U.S. 693, 712-13 (1976).

**/ United States v. Caceres, 440 U.S. 741 (1979); United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293, 302 (1966).

***/ Katz v. United States, 389 U.S. 347, 351 (1967). Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

As a variation on the notion of privacy plaintiffs assert a right of privacy in association as recognized in NAACP v. Alabama, 357 U.S. 449 (1958), and a right of privacy of political belief as recognized in Jones v. Unknown Agents of the Federal Election Commission, 613 F.2d 864 (D.C. Cir. 1979).

Neither case is applicable here. NAACP v. Alabama pertained to a governmental effort to compel disclosure of membership in an association where there was a clear threat, based on past practice and experience, of harrassment, intimidation, and physical harm if disclosure occurred. The Constitution does not, however, prescribe a general right of privacy barring the government from acquiring knowledge of members of political organizations in connection with proper law enforcement or administrative purposes. Buckley v. Valeo, 424 U.S. 1 (1976); Reporters Committee v. American Telephone and Telegraph, 593 F.2d 1030 (D.C. Cir. 1978).

Jones, supra, involved an allegation that government investigators were conducting interviews of private citizens and endeavoring to inquire into their private political beliefs. As pertinent to this civil action, the plaintiffs were stating their political beliefs freely and openly in public gatherings, meetings, and in publicly disseminated writings. No plaintiff has alleged that he was compelled to disclose his beliefs or subjected to threats or harrassment at the hands of the defendants. To the extent plaintiffs' political beliefs are recorded in FBI files, the information was obtained as the result of the voluntary, uncompelled disclosure by plaintiffs.

Plaintiffs' claim of mental and emotional distress is hollow. The "distress" allegedly occurred when plaintiffs read their files. No overt signs of stress, such as bodily injury, sickness, or even phychological or psychiatric treatment, are alleged. In the absence of physical impact, plaintiffs have no cause of action for negligent infliction of emotional stress. Garber v. United States, 578 F.2d 414 (D.C.. Cir. 1978). In this case, plaintiffs' allegation itself is contrary to the notion of intentional infliction of emotional harm. In any event, plaintiffs make no allegation that these defendants acted with such intention. Furthermore, a claim of emotional

distress is not actionable under the civil rights statutes, 42 U.S.C. §§ 1983, 1985(3). Robinson v. McCorkle, 462 F.2d 111 (3rd Cir. 1972); Dear v. Rathje, 391 F. Supp. 1 (N.D. Ill. 1975), affirmed, 532 F.2d 756 (7th Cir. 1976); Taylor v. Nichols, 409 F. Supp. 927 (D. Kan. 1976), affirmed, 558 F.2d 561 (10th Cir. 1977).

In addition, taking the allegation of emotional harm as an element of damages rather than as a cause of action, plaintiffs are not entitled to a presumption that mental and emotional distress occurred. See Carey v. Piphus, 435 U.S. 247, 259-64 (1978). Plaintiffs must prove the nature and circumstance of the wrong and its effect on them individually. In the absence of proof of actual, if intangible injury, plaintiffs would be entitled to no more than nominal damages for vioaltion of constitutional rights. Carey, supra, at 266-67.

The alleged injury in this instance, as it is unaccompanied by physical injury, is subjective in nature. Expert evidence is therefore necessary, otherwise the jury must rely only on the self-serving testimony of plaintiffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1981, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing MEMORANDUM BY FEDERAL DEFENDANTS ON THEIR DEFENSES.

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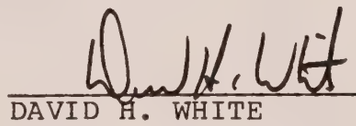

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# DC. Bond

715 - 705

(a) The D. of C. or any officer thereof acting therefor may not be required to pay court costs or fees in any court ~~in~~ in and for the D. of C.

(b) The D. of C. may not be required to pay fees to the clerk of the US Ct of Appeals for the D of C, or to the marshals of the D, and is entitled to the services of the marshall in the service of all civil process.

(c) The US and the D of C may not be required to pay fees & costs for services rendered by the clerk of the US DC for the D of C and the Register of Wills.

(d) Neither the US nor the D. of C., nor any officer of either acting in his official capacity, may be required to give bond or enter into undertaking to perfect an appeal or to obtain an inj. or other writ, process, or order in or of any court in the D. of C. for which a bond or undertaking is required by law or rule of court.

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This does not apply to reimbursement of a party for costs incurred by other party. Dillard v. Liddell, 334 A.2d 578 (1975).

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See Moore's 62.07 + AR 208.03

7 Moore's Fed. Prac. ¶ 62.07

When, for eg., a money judgmt is obtained against a collector of customs" and an appeal is taken by direction of a department of the government, the appeal operates as a supersedeas. Similarly, a defendant national bank and a receiver thereof appealing under the direction of the comptroller of currency need not execute a supers. bond in order to be entitled to a stay of execution or other proceedings for enforcement. The receiver ought, however, to show that he was acting under the express direction of the comptroller."

"In the normal case it will be easy to determine when the appeal is taken by 'the US or an officer or agency thereof ...'. But when there is doubt, the appellant must clearly bring himself within the subdivision to the relief of the ordinary obligations of giving bond."

Schell v. Cochran (1882) 107 US 625
Platt v. Advance, 90 F. 772
Pepper v. Fidelity. 125 F. 822

→ The principle behind all relief from bonds for US is "that it is to be presumed the government is always ready and willing to pay its ordinary debts." p. 628.